

Country Profile: Ghana

Introduction

Since the creation of its current constitution in 1992, Ghana has continually sought to improve both its judiciary and its justice system more broadly. This report will focus on two of those reform efforts: The provisions of the 1992 constitution regarding judicial independence, and the establishment of a separate commercial court system beginning in 2003.

Background

The Ghanaian people won their independence from colonial rule in 1956.¹ The new government was modeled after the parliamentary system present in the United Kingdom.² However, a series of constitutional amendments in 1960 slowly pushed Ghana into a one-party state with a powerful president.³

These reforms were motivated in part by a desire of Ghanaians to distance themselves from the constitutional monarchy associated with British rule.⁴ The framers described this new constitutional system as “not copied from the Constitution of any other country. It has been designed to meet the particular needs of Ghana and to express the realities of Ghana’s constitutional position.”⁵ This new system was characterized by a strong executive who was not bound to listen to the advice of their ministers.⁶

However, the system quickly deteriorated, and the country experienced significant political turmoil and a series of military coups in the intervening decades.⁷ In 1981, a final coup

¹ *Constitutional History of Ghana*, CONSTITUTIONNET, <https://constitutionnet.org/country/ghana> (last visited Mar. 22, 2022).

² *Id.*

³ *Id.*

⁴ See Egon Schwelb, *The Republican Constitution of Ghana*, 9 AM. J. COMPAR. L. 634, 638 (1960).

⁵ *Id.* at 634.

⁶ See *id.* at 643.

⁷ See *Constitutional History of Ghana*, CONSTITUTIONNET, <https://constitutionnet.org/country/ghana> (last visited Mar. 22, 2022).

d'état suspended the existing constitution and opened the path for a new constitution with the intent of restoring democratic rule.⁸ In 1992, the country ratified a new constitution through a national referendum with 92% voting in favor of the new document.⁹

Reforms

Constitutional Provisions

Separation of powers was a key element of Ghana's new constitution.¹⁰ The Consultative Assembly, which drafted the new constitution, believed strict separation between the executive, legislative, and judicial branches was necessary.¹¹

To that end, the constitution includes a number of explicit guarantees of judicial independence. Article 125 vests the judicial power in the judiciary and states that no "organ or agency of the President or Parliament shall have or be given final judicial power."¹² The administrative independence of the judiciary is provided by Article 127.¹³ The same article also gives judges immunity for suit for their judicial activities and prohibits the other branches from interfering with the judiciary's exercise of judicial power.¹⁴ And Article 127 prohibits the legislature from altering the salaries, pensions, or other benefits of judicial officers "to [their] disadvantage."¹⁵

Finally, judges of the superior courts (which refers to the Supreme Court, appellate courts, high courts, and regional tribunals)¹⁶ are protected from removal except for cases of

⁸ *Id.*

⁹ KWAME BOAFO-ARTHUR, GHANA: ONE DECADE OF THE LIBERAL STATE 3 (Coderisa Books ed., 2007).

¹⁰ See Ernest Owusu-Dapaa, *An Exposition and Critique of Judicial Independence Under Ghana's 1992 Constitution*, 37 COMMONWEALTH L. BULL. 531, 543 (2011).

¹¹ *Id.*

¹² Constitution of Ghana, art. 125, cl. 3.

¹³ Constitution of Ghana, art. 127, cl. 1.

¹⁴ Constitution of Ghana, art. 127, cl. 2-3.

¹⁵ Constitution of Ghana, art. 127, cl. 5.

¹⁶ See Constitution of Ghana, art. 126, cl. 1.

misbehavior or misconduct.¹⁷ If the superior court judge in question is anyone other than the Chief Justice, the President must refer the case over to the Chief Justice who determines whether there is a prima facie case against the judge.¹⁸ If the Chief Justice determines there is a prima facie case, they establish a commission consisting of other judges and members of the Judicial Council to investigate the case and decide whether the judge should be removed.¹⁹ If the Chief Justice is the judge in question, the President appoints a different commission to investigate their conduct.²⁰

Judges are appointed either by the President or the Chief Justice.²¹ The appointment of justices to the supreme court must be affirmed by Parliament,²² and the appointer acts on the advice of various councils. However, the appointer is not required to follow that advice.²³

The Ghanaian constitution also includes a unique protection of judicial power. Disobedience of the constitution by the President is considered a crime and constitutes an independent ground for impeachment.²⁴ While the Chief Justice and four other Supreme Court Justices determine whether there is a prima facie case for impeachment, Parliament must ultimately vote to impeach the President by a two-thirds majority.²⁵

Commercial Court Reforms

¹⁷ Constitution of Ghana, art. 146, cl. 1.

¹⁸ Constitution of Ghana, art. 146, cl. 3.

¹⁹ Constitution of Ghana, art. 146, cl. 4-5.

²⁰ Constitution of Ghana, art. 146, cl. 6.

²¹ *See* Constitution of Ghana, art. 144, cl. 1-5.

²² *See id.*

²³ *See* Ernest Owusu-Dapaa, *An Exposition and Critique of Judicial Independence Under Ghana's 1992 Constitution*, 37 COMMONWEALTH L. BULL. 531, 552 (2011).

²⁴ *See* Constitution of Ghana, art. 69, cl. 1.

²⁵ *See* Constitution of Ghana, art. 69, cl. 4, 11.

In 2003, Chief Justice George Kingsley Acquah set out to create a specialized commercial court in Ghana.²⁶ The effort was part of a larger push by the country to raise its economic status and encourage foreign investment.²⁷ However, the reforms also sought to restore the prestige of the judiciary, which has been greatly diminished prior to the new constitution due to a lack of resources, military rule, and the murder of three judges in 1982.²⁸ To fund his reforms, the Chief Justice applied and received grants from the Danish International Development Agency, which had funded commercial courts elsewhere.²⁹

The main thrust of the reform effort was to create a separate Commercial Court that would be specially equipped to handle large commercial disputes. This new court followed modified procedural rules aimed at increasing the speed of adjudication.³⁰ For example, adjournments (what would be called a continuance in American courts) are limited to 72 hours in the Commercial Court.³¹ The Commercial Court also adopted mandatory pre-trial conferences and professionally guided mediation.³² Finally, the courts embraced an active style of case management by judges.³³

The Chief Justice took advantage of the country's vibrant ex-patriate community abroad by reaching out and encouraging them to return and practice in the Commercial Court.³⁴ The expatriate community quickly filled many important positions in the Commercial Court.³⁵

Analysis

²⁶ Sandra Cofie, *Ghana: Establishment of the Commercial Court*, INT'L FIN. GRP. (Dec. 2007), <https://documents1.worldbank.org/curated/en/359951468282916652/pdf/456390BRI0Box3120Commercial120Court.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *See id.*

Constitutional Reforms

Judicial independence in Ghana is complicated. The government generally respects the rule of law.³⁶ In a number of prominent cases the government has respected adverse court decisions.³⁷ For example, in *NPP v. IGP*, the Supreme Court invalidated a permit requirement for political demonstrations.³⁸ In *NPP v. GBC*, the Supreme Court required state media to provide equal access to opposition parties.³⁹

However, public perception of the judiciary remains low.⁴⁰ Studies on public perceptions of the judiciary vary dramatically,⁴¹ but the judiciary still ranks as one of the most corrupt institutions in Ghana.⁴² Most relevant to this report is the perception that the judiciary is biased in favor of the government. The Supreme Court recently decided a controversial case regarding whether Deputy Speakers of the House could cast a vote in Parliament.⁴³ Because of the even split between the political parties in Parliament, this decision essentially decided whether the governing party could pass its budget.⁴⁴ In the wake of this decision, many accused the justices of favoring the current governing party.⁴⁵ Members of Parliament have also accused judges of being “political judges.”⁴⁶ Yet it is difficult to evaluate the legitimacy of these grievances because

³⁶ KWADWO APPIAGYEI-ATUA, GHANA: JUSTICE SECTOR AND THE RULE OF LAW 40 (Open Soc’y Inst. W. Afr. ed., 2007).

³⁷ *See id.* at 7 (describing cases where the Supreme Court upheld constitutional rights in face of government infringements, and the government respected the decision).

³⁸ *Id.* at 5.

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 65.

⁴¹ *Id.* (contrasting a survey finding 73% of Ghanaians felt the judiciary was influenced by the executive branch with another survey finding 65% of households felt there was no influence from the executive branch in the decisions of the judicial branch).

⁴² *Id.* at 75.

⁴³ Malik Sullemana, *Ghana: Deputy Speaker Has Right to Vote - SC Declares*, ALLAFRICA (Mar. 10, 2022), <https://allafrica.com/stories/202203100480.html>.

⁴⁴ *See id.*

⁴⁵ *See* Video conference interview with Kwadwo Appiagyei-Atua, Associate Professor at the University of Ghana School of Law (Mar. 22, 2022).

⁴⁶ *See, e.g., Sosu’s ‘political judges’ comment ‘harmless’ – Kwaku Azar*, GHANAWEB (Feb. 18, 2022), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Sosu-s-political-judges-comment-harmless-Kwaku-Azar-1472018>.

it remains possible that the correct legal interpretation just so happened to favor the governing party.

The President would face little difficulty appointing political allies who would decide cases in his or her favor. As multiple commentators have pointed out, there are few meaningful checks on the President's appointment power.⁴⁷ The president is not required to listen to the advice of the Judicial Council.⁴⁸ Moreover, because the party which controls the presidency almost invariably controls Parliament as well—and Members of Parliament have historically voted along party lines for judicial nominees—Parliament's approval of judicial nominees is not a meaningful check on President's power.⁴⁹

Despite the President's theoretically unchecked appointment power, there is little indication the President merely appoints political allies. The trend has actually been in the opposite direction, with the Judicial Council conducting interviews with nominees in a more merit-based process.⁵⁰ And, as discussed above, the Ghanaian constitution provides extremely potent guarantees of judicial independence once the judges are appointed.⁵¹ Thus, while the President might be able to appoint political allies, it is much more difficult to ensure their continuing loyalty.

The most unique provision of Ghana's constitutional judicial independence remains untested. Since no president of Ghana has been impeached under the current Constitution, it is

⁴⁷ See, e.g., KWADWO APPIAGYEI-ATUA, GHANA: JUSTICE SECTOR AND THE RULE OF LAW 3 (Open Soc'y Inst. W. Afr. ed., 2007) (advocating for constitutional reform because the current process "provide[s] the president with too great a discretion"); Ernest Owusu-Dapaa, *An Exposition and Critique of Judicial Independence Under Ghana's 1992 Constitution*, 37 COMMONWEALTH L. BULL. 531, 552 (2011).

⁴⁸ KWADWO APPIAGYEI-ATUA, GHANA: JUSTICE SECTOR AND THE RULE OF LAW 40 (Open Soc'y Inst. W. Afr. ed., 2007); Ernest Owusu-Dapaa, *An Exposition and Critique of Judicial Independence Under Ghana's 1992 Constitution*, 37 COMMONWEALTH L. BULL. 531, 552 (2011) (critiquing Ghana's judicial appointment system).

⁴⁹ Ernest Owusu-Dapaa, *An Exposition and Critique of Judicial Independence Under Ghana's 1992 Constitution*, 37 COMMONWEALTH L. BULL. 531, 550 (2011).

⁵⁰ KWADWO APPIAGYEI-ATUA, GHANA: JUSTICE SECTOR AND THE RULE OF LAW 9 (Open Soc'y Inst. W. Afr. ed., 2007).

⁵¹ See Constitution of Ghana, art. 127.

not clear how Article 69 would play out. In theory, the provision could provide a strong check against an executive that disobeys the constitution. By explicitly penalizing constitutional violations with impeachment, the constitution may help create a norm against constitutional violations by sitting presidents.

However, it could also add an additional layer of security for the President. The American model of impeachment provides that a supermajority of the legislature must vote to impeach the president.⁵² The Ghanaian model adds an additional step: not only must the legislature vote by a two-thirds majority to impeach the President,⁵³ a group of justices must also find a *prima facie* case against the President.⁵⁴ These justices may have been appointed by the very same president, or at least a member of his or her party. Conversely, once the justices have found a *prima facie* case, it may be more difficult—as a political matter—for Members of Parliament from the same party as the President to vote against impeachment.

Another issue with judicial independence and rule of law in Ghana stems not from the constitution itself but from its practical effect. Many disputes are not handled by the judiciary at all. In rural parts of the country, most cases are brought before religious leaders or local chiefs through traditional dispute resolution systems rather than formal courts.⁵⁵ In some case this may be a genuine preference on the part of the parties. However, in many cases they have no other option. This is in part due to court fees levied against parties and a lack of literacy, which prevents impoverished parties from utilizing the court system.⁵⁶ But it is also the result of a lack

⁵² See U.S. Const. art. I, §3.

⁵³ Constitution of Ghana, art. 69, cl. 11.

⁵⁴ Constitution of Ghana, art. 146, cl. 3.

⁵⁵ Video conference interview with Kwadwo Appiagyei-Atua, Associate Professor at the University of Ghana School of Law (Mar. 22, 2022).

⁵⁶ *Id.*

of court staff. In some rural districts judges must split their time between different courthouses and thus cannot hear cases in a timely manner.⁵⁷

These traditional forms of dispute resolution may be an adequate substitute in some cases. But it is worth noting that the judicial independence diligently set forth in Ghana's constitution are entirely absent from these proceedings. And, in some contexts, residents are required to take matters into their own hands to defend their property, such as with the use of "land guards" to protect their property from trespass.⁵⁸ Moreover, women are often unable to use these traditional dispute resolution systems because of traditional gender roles.⁵⁹

Commercial Reforms

Chief Justice Acquah's reforms have received wide acclaim in the business community.⁶⁰ The Commercial Court ranks 58th for judicial independence and 50th for the resolution of commercial disputes.⁶¹ A World Bank report found the Commercial Court disposes of cases significantly faster than any other high court in Ghana.⁶² The specialized court has lower adjournment rates,⁶³ higher closure rates,⁶⁴ faster service of process,⁶⁵ and superior case management than the other high courts.⁶⁶ For example, in a sample of eighty cases from the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Justice for All: Reforms Continue to Overhaul the National Court System*, OXFORD BUS. GRP., <https://oxfordbusinessgroup.com/analysis/justice-all-reforms-continue-overhaul-national-court-system> (last visited Mar. 22, 2022).

⁶¹ *Id.*

⁶² WORLD BANK, *USES AND USERS OF JUSTICE IN AFRICA* 34 (2010), <https://documents1.worldbank.org/curated/en/761881468003039365/pdf/579870ESW0P1121Ghana0pub09115110web.pdf>.

⁶³ *Id.* at 38.

⁶⁴ *Id.* at 41.

⁶⁵ *Id.* at 34.

⁶⁶ *Id.*

Commercial Court, all eighty reached closure.⁶⁷ Meanwhile, only 75% of those sampled from the ordinary high court reached closure.⁶⁸

Unfortunately, while the Commercial Court itself experienced initial success, there is little evidence that the success has spread to other courts in Ghana. The other high courts lag behind the Commercial Court in terms of efficiency.⁶⁹ According to the World Bank report, the success of the Commercial Court hinges on both the court's greater automation and its procedural rules.⁷⁰ Yet other courts in Ghana—even specialized courts—have not adopted the Commercial Court's expedited procedural rules,⁷¹ and they have failed to achieve the Commercial Court's success.⁷²

The Commercial Court also has a relatively narrow reach. Nearly two-thirds of the litigants who appear before the court are institutions—overwhelmingly private institutions.⁷³ Although that leaves an appreciable number of individuals appearing before the Commercial Court, appearances by individuals in the Commercial Court are lower than any of the other high courts.⁷⁴

With time, even the success of the Commercial Court has subsided.⁷⁵ Despite significant initial investment into new courthouses and technology when Chief Justice Acquah was creating the courts,⁷⁶ the courts have failed to maintain the technology and have been forced to resort to

⁶⁷ *See id.* at 41.

⁶⁸ *See id.*

⁶⁹ *Id.* at 38.

⁷⁰ *Id.* at xvi.

⁷¹ *See id.*

⁷² *See id.* at 34.

⁷³ *See id.* at 26.

⁷⁴ *See id.*

⁷⁵ Video conference interview with Kwadwo Appiagyei-Atua, Associate Professor at the University of Ghana School of Law (Mar. 22, 2022).

⁷⁶ *See* Sandra Cofie, *Ghana: Establishment of the Commercial Court*, INT'L FIN. GRP. (Dec. 2007), <https://documents1.worldbank.org/curated/en/359951468282916652/pdf/456390BRI0Box3120Commercial120Court.pdf>.

manual or other slower methods.⁷⁷ The Commercial Court certainly remains prestigious, and particularly competent judges are sometimes rewarded with a spot on its bench; however, the speed with which it can adjudicate cases has diminished.⁷⁸

Conclusion

In 1992 Ghana created a new constitution designed to avoid the executive overreach it had previously experienced.⁷⁹ Compared to the prior, undemocratic regimes, the new constitutional system is a remarkable success. However, it is unclear whether the country has successfully delivered on the promise of judicial independence and the rule of law. In most cases the government respects the rule of law.⁸⁰ However, there are deep public concerns with executive influence over the judiciary or at least with judges being loyal to the governing party.⁸¹

Meanwhile, Ghana's Commercial Court, while succeeding in winning the respect of the business community,⁸² have failed to strengthen the judiciary as a whole.⁸³ And, with time and a lack of updated technology, they have begun to fall behind.⁸⁴

⁷⁷ Video conference interview with Kwadwo Appiagyei-Atua, Associate Professor at the University of Ghana School of Law (Mar. 22, 2022); *see also* WORLD BANK, *USES AND USERS OF JUSTICE IN AFRICA* 46 (2010), <https://documents1.worldbank.org/curated/en/761881468003039365/pdf/579870ESW0P1121Ghana0pub091151> (explaining that litigants choose courts like the Commercial Court because they have nicer facilities and judges do not need to rely on longhand note taking).

⁷⁸ *Id.*

⁷⁹ *See Constitutional History of Ghana*, CONSTITUTIONNET, <https://constitutionnet.org/country/ghana> (last visited Mar. 22, 2022).

⁸⁰ KWADWO APPIAGYEI-ATUA, *GHANA: JUSTICE SECTOR AND THE RULE OF LAW* 40 (Open Soc'y Inst. W. Afr. ed., 2007).

⁸¹ *Id.* at 65; Video conference interview with Kwadwo Appiagyei-Atua, Associate Professor at the University of Ghana School of Law (Mar. 22, 2022).

⁸² *See, e.g., Justice for All: Reforms Continue to Overhaul the National Court System*, OXFORD BUS. GRP., <https://oxfordbusinessgroup.com/analysis/justice-all-reforms-continue-overhaul-national-court-system> (last visited Mar. 22, 2022).

⁸³ *See* Video conference interview with Kwadwo Appiagyei-Atua, Associate Professor at the University of Ghana School of Law (Mar. 22, 2022).

⁸⁴ *Id.*

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